the custom* to make, such promotions in seniority order and the agreement governing the employment of machinist helpers provided that seniority shall date from the day on which the employe first performs service on a regular assignment in that craft, were petitioners entitled by virtue of the Act to seniority as machinist helpers retroactive to the date on which they might have been promoted had they not been absent?

STATEMENT.

Petitioners left positions as laborers in the employment of the railroad to enter military service. When they returned, they were restored to their positions as laborers (R. 56-57) with their original seniority dating (R. 56) as such laborers.† Shortly thereafter they were promoted to positions as machinist helpers (R. 57), a craft or class "completely separate and distinct" from that of laborers (R. 59).

While employed as laborers, petitioners were subject to and acquired seniority under the "unskilled agreement" (R. 55; Exhibit 1, R. 265). When they became machinist helpers they were subject to and acquired "wholly separate" seniority (R. 59) under a separate collective bargaining agreement referred to (R. 56) as the "skilled agreement" (Exhibit 3, R. 266).

The unskilled agreement contains a provision (R. 60) that employes covered thereby will be "given con-

*Petitioners' statement of the question incorrectly assumes an established custom to promote laborers in seniority order to helper positions.

†Petitioners continued to accumulate seniority as laborers while they were in military service, and when they were restored with their original seniority datings they thereby received cumulative seniority credit for all the time they were absent.

sideration for promotion" to positions under the skilled agreement and that such promotions will be based on "ability, merit and seniority." It was stipulated (R. 60) that at no time has that provision been intended, interpreted or applied as requiring the railroad to promote laborers in the order of their seniority.

The skilled agreement contains a provision that seniority in the several crafts covered by that agreement (including machinist helpers) shall commence on the date on which the employe first performs service on a regular assignment in the particular craft (R. 60-61, 126).

Contrary to that provision, when petitioners (and numerous other veterans similarly situated) were promoted to positions under the skilled agreement, each was given seniority in the new position as of the day a laborer junior to him on the *laborers'* seniority roster was promoted during the veteran's absence (R. 57-58).* The practice of giving retroactive seniority to helpers promoted from laborer positions after their

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*The circumstances under which this predated or retroactive seniority was given in contravention of the skilled agreement are fully set forth in Exhibit 4 (R. 69-72) with the stipulation, which is the collective agreement under which petitioners' seniority datings were changed to conform to the requirements of the skilled agreement. Paragraph F of the correcting agreement is as follows (R. 70):

> "(F) The government agency in charge of the administration of the Selective Training and Service Act, was during the time mentioned contending that Section 8 of that Act required that returned veterans be given this special preference and certain of the lower Federal courts had so held. The parties hereto accepted this interpretation of the Selective Training and Service Act and acted as they supposed in accordance with their duties under that statute."

That refutes petitioners' unsupported statement (pp. 6, 26 footnote 18) that retroactive seniority was assigned to veteran laborers pursuant to a memorandum of understanding dated January 15, 1943 (R. 86). In quoting (pp. 6-7) from that memorandum petitioners conveniently omit the clause "all in accordance with the existing rules of the schedule agreement."

return from military service was attacked by non-veteran helpers in a suit filed in the District Court at Louisville (R. 61) against this respondent and others. In that action the District Court held that the Selective Training and Service Act of 1940 did not require that veterans be given "this superseniority" (R. 99) and that such was a violation of the rights of non-veterans (R. 121).

On January 31, 1949, after the trial of that action, this respondent entered into an agreement (R. 16-19) with its employes (including petitioners ~~respondents~~) represented by the collective bargaining agents of the skilled crafts, providing in part that:

> "3. . . . in each instance where a veteran held seniority only as a laborer in the unskilled craft at the time of his induction or enlistment in the armed forces of the United States and has been promoted to a position of helper, his seniority as helper shall date from the day when he first performed services as a regularly assigned helper after returning from the armed forces."

In accordance with that agreement the seniority dating of each of the petitioners (and all others similarly situated) was changed to the date he first performed regularly-assigned service as a helper, rather than the earlier dating previously assigned to him through error and misunderstanding of the law.

REASONS WHY THE PETITION SHOULD BE DENIED.

Respondent submits that the petition for a writ of certiorari should be denied because (1) petitioners request review of a question of fact which has been decided against them by the courts below; (2) petitioners were not denied any right under the Selective Training and Service Act; and (3) the claimed conflict in Federal Court decisions does not exist.

PETITIONERS REQUEST REVIEW OF A QUESTION OF FACT WHICH HAS BEEN DECIDED AGAINST THEM BY THE COURTS BELOW.

The basic premise of the petition herein is that although the record allegedly shows that it was the custom and practice to promote laborers to helpers in seniority order, the District Court and the Court of Appeals gave no consideration to this claimed custom and practice. Petitioners assert (p. 6, n. 6) that the District Court made no finding on this "critical" issue and (pp. 14-15) that the courts below ruled against them because they did not show a contract right to promotion.

Respondent asserts that the issue of custom was not only considered by both of the courts below, but that the District Court found that no such custom was shown to exist and the Court of Appeals affirmed that finding. In his opening statement to the District Court, petitioners' counsel, Mr. Leet, stated the Government's theory of the case as follows (R. 139): "It is our view that in this case these men had not a high probability,

but an absolute certainty of promotion . . ." He insisted (R. 148) that "It is not a contractual right case at all . . ." A colloquy (R. 148)* between the trial court and counsel for the parties concerning the issues shows beyond any doubt that the Court understood the distinction between "contractual right" and "factual certainty." Thus it was made perfectly clear at the outset that counsel for petitioners was relying on a claimed custom to promote laborers in seniority order. The District Court squarely found that there was no such custom. See the following statement (R. 126) in the Findings of Fact:

> "On numerous occasions, before, during and after the period of plaintiffs' absence in the armed forces, the defendant Railroad Company employed as machinist helpers persons who were not working either as laborers or as machinist helpers and who held no seniority in either classification, even though there were then available laborers who might have been, and some of whom subsequently were, promoted to positions as machinist helpers. Some of the laborers promoted to machinist helpers before, during and after plaintiffs' absence in the armed forces, were not promoted in order of their seniority as laborers."

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*"Mr. Lyman: . . . We have stipulated there is no contractual right.

". . .

"Mr. Leet: And the fact that all these other fellows were promoted in seniority order and that shows a factual certainty they would have been promoted, . . .

"Mr. Lyman: I submit that Mr. Leet is trying to confuse the thought. . . . he is trying to say the statute entitled them to get it because if they had not been veterans and been here instead of in the Army they would have had it.

"By the Court: That is what he is saying now.

"Mr. Lyman: All right.

"Mr. Leet: I don't think the Court is a bit confused."

Having thus found that there existed no factual certainty that petitioners would have been promoted had they not been in the armed forces, the Court quite properly included in its Conclusions of Law II this statement (R. 133-134):

> "A great presumption or strong probability that plaintiffs would have been promoted had they remained at their work during the period of their military service does not entitle them to seniority in the promoted position."*

In the Court of Appeals, petitioners argued that they had amply demonstrated in the lower court a customary practice of promotion in accordance with seniority rank. This respondent answered that argument by demonstrating that petitioners had not shown such a custom. Petitioners correctly state here (p. 8) that one of the grounds upon which the Court of Appeals affirmed was that such promotion was not a matter of "right or of certainty," that is, "contract right" or custom-derived "factual certainty." For the Court cited its opinion in *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466, where the plaintiffs had based their claims to promotion on contract right "and also upon the alleged established custom of filling vacancies in the position of electrician by appointment of those having the highest seniority in the position

*In footnote 12, p. 15, petitioners state that this conclusion makes it "absolutely plain" that the courts below rejected petitioners' "factual certainty" theory and decided the case on the "contractual right" theory. Petitioners thus attempt to equate "strong probability" and "factual certainty," which cannot be done. The courts adopted this conclusion because they had examined petitioners' evidence in support of a custom and practice showing factual certainty of promotion and had found it insufficient to show more than a strong probability.

of electrician-helpers" (p. 468). The trial court in *Raulins* ruled that plaintiffs had not shown a right to promotion "by virtue of any custom or by virtue of any contract" (p. 469). It was in this context that the appellate court, affirming the judgment there, said that "such promotion was not a matter of right or of certainty . . . " (p. 469).

In light of the foregoing it is futile for petitioners to now contend that the courts below did not pass upon the question of custom upon which petitioners' case was based.

Before this Court could reach the question of the effect of the alleged custom to promote laborers in seniority order, it would have to find as a fact that such custom existed. To so find, this Court would have to review and overturn the concurrent findings of fact of the two courts below, action which the Court has said it is unwilling to take in the absence of a very obvious and exceptional showing of error (*Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275). No such showing has been or can be made here. That being so, Mr. Justice Holmes' terse dictum that "We do not grant a certiorari to review evidence and discuss specific facts"* should control here.

PETITIONERS WERE NOT DENIED ANY RIGHT UNDER THE SELECTIVE TRAINING AND SERVICE ACT.

Petitioners say (p. 2) that they would have been promoted "in accordance with the custom and practice of the employment" had they not been in military service, and (p. 5) that when laborers were promoted

**United States* v. *Johnston*, 268 U. S. 220, 227.

it was the custom and practice to promote them "in order of seniority."* But as shown under the previous heading, these statements are directly contrary to the previously-quoted findings of the District Court (R. 126).

The argument (pp. 8-9) that petitioners' period of military service has been "carved out" of their seniority as machinist helpers and that they have thus been deprived of a substantial part of their seniority rights ignores the fact that they had no seniority or other rights as helpers when they entered military service, and erroneously assumes the existence of the very rights which they have been unable to establish.

Petitioners' argument (pp. 9-14) that the decision of the courts below conflicts with the interpretation of the Act "clearly established" by this Court in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, is untenable. The sole question before the Court in *Oakley* was the duration of the veteran's rights, not a definition of them. The Court did not hold that the veteran was entitled to the higher rating he claimed he would have had if he had not entered military service. Its remarks on this point were entirely suppositive, its holding being strictly confined to the issue of duration:

> "*If he were entitled to the higher rating* upon his reemployment, the Act did not deprive him

*Obviously, the custom-and-practice argument would be pointless without the further contention that when laborers were promoted such promotions were made in seniority order. But petitioners try to establish their contention that laborers were promoted in seniority order by attempting to explain why so many were promoted out of seniority order. One has only to refer to Exhibits 5, 6 and 7 (R. 73, *et seq.*) and glance down the column to the right of each page to see that laborers frequently were not promoted in seniority order.

> of that rating merely by virtue of the expiration of his first year of reemployment." (Emphasis supplied.) (338 U. S. at p. 284.)

There is thus no intimation in *Oakley* or in any other case from this Court that the veteran is to be treated as if he had remained continuously "on the job," as petitioners contend.* The Court not only refrained from passing on the question involved here, but the statements quoted by petitioners from that opinion had reference to the "particular employment" in which the veteran was engaged before he went into military service, and not to a position which otherwise he might have acquired. Petitioners had no seniority or other rights as machinist helpers until they established such rights by performing actual services on regular assignments in that craft (R. 60-61, 126).† In *Delozier* v. *Thompson, et al.* (8 Cir.), 167 F. 2d 626, certiorari denied 335 U. S. 886, the Court of Appeals, affirming judgment against Delozier, said (pp. 631-2):

> "Although it is stipulated that had he remained in the position of helper until November

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*Upon remand, the trial court did not construe the *Oakley* opinion as requiring that the veteran be afforded the status he claimed. Granting the defendant's motion for summary judgment, the Court said (19 CCH Labor Cases Par. 66,132, p. 78,816):

> "The [Act], as amended, did not require defendant Railroad Company to accord to plaintiff a seniority status in a position other than that which he left to enter the armed forces, to which status his seniority in his restored position did not automatically entitle him, and which, had he not been in the armed forces, he could or might have achieved only by actually going to work in such other position."

†In his conclusions of law the District Court said (p. 133):

> "II. Seniority acquired by plaintiffs as laborers could not be counted as seniority on the machinist helper seniority roster prior to plaintiffs' actual promotion to positions as helpers. Seniority in one class does not constitute seniority in another. *Boston & M. R. Co.* v. *David*, 167 F. 2d 722 (CCA 1)."

2, 1942, he would on that date have been advanced to the position of mechanic, it is a conceded fact that he occupied the position of helper at the time of his induction. The seniority which accrued to him during the time he served with the armed forces was seniority in the position of helper and not as mechanic. Since he was restored to the position of helper upon his return, he can have no just complaint that his rights under [the Act] have not been fully accorded to him."

THE CLAIMED CONFLICT OF FEDERAL COURT DECISIONS DOES NOT EXIST.

Petitioners' second point (p. 15) that the decision below conflicts with *Morris* v. *Chesapeake & O. R. Co.*, 171 F. 2d 579 (C. A. 7), and *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.), is equally untenable. In the *Morris* case it was not only customary (as petitioners say) to permit telegraphers to apply for train dispatcher positions in the order of their seniority, but such was the *right* of the telegraphers under their collective agreement. That right was recognized in the employer's agreement with the train dispatchers, and vacancies in the latter group were advertised to telegraphers for seniority bidding without respect to whether the employees were working as telegraphers or were on leave of absence or in military service. Morris was notified of and bid for a position while in military service, but had not been notified of three previous vacancies occurring during his absence, all of which had been filled by telegraphers junior to Morris. In holding that Morris was entitled to the first of the three vacancies occurring during his absence,

the Court did not set a precedent applicable to the facts here, where petitioners had no agreement right to bid on helper positions, either *in absentia* or while on the job, nor any agreement or other right to promotion in seniority order.

Petitioners misstate the facts in the *Conner* case in saying (p. 16) that the veterans (freight trainmen) sought seniority on the passenger trainmen list from the date upon which they would have transferred to the latter list had they remained continuously in their civilian employment. Exactly to the contrary, the plaintiffs (veterans) there complained because the railroad had permitted other veterans to transfer from the freight list to the passenger list as of the dates they would have had a right to elect to transfer had they not been in military service. The plaintiffs relied upon *Hewitt* v. *System Federation,* 161 F. 2d 545; *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466, and *Boston & Maine R. Co.* v. *David,* 167 F. 2d 722, but the court distinguished those cases by saying (p. 858) that:

> "None of those cases dealt with a contractual right to transfer from one roster to another on the basis of seniority."

The right of the veterans in the *Conner* case to transfer in seniority order is similar to the right of the telegraphers in the *Morris* case to promotions in seniority order. No such right existed here.

Petitioners' argument (p. 19, *et seq.*) against the application of the "furlough or leave of absence" test prescribed by the Act is merely an argument that the

plain language of the Act should be ignored. In support of the argument, petitioners state (p. 20) that respondent's "employees on furlough or leave lose seniority by virtue of their absence," from which they would have the Court conclude that it would be contrary to the Act's prohibition against loss of seniority to treat petitioners as non-veterans returning from leave of absence are treated. But the statement is untrue. A laborer on non-military leave of absence continues to accrue seniority as laboror. So did the petitioners while on military leave of absence. A laborer on non-military leave does not acquire seniority in a helper position becoming vacant during his leave and for which he might have been selected had he been on the job. Neither did the petitioners while on military leave. It is because petitioners did not *gain* this new seniority in positions in another craft that petitioners contend that they *lost* seniority by reason of their absence in military service. Petitioners' attempt to make "to gain" synonymous with "to lose" is novel, but unavailing. Therefore, the "apparent dilemma" which petitioners envision (p. 20) does not exist.

Although the *Conner* and *Morris* cases can, as above shown, be distinguished from the *Raulins, Hewitt* and *David* cases on the facts, yet petitioners persist in contending, in effect, that all decisions which apply the "furlough or leave of absence" test as it was applied in such cases as *Raulins* should be overruled and that this Court should adopt a theory of "superseniority" for veterans, contrary to its decision in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, that Congress has not sought to "sweep aside the seniority

IN THE

Supreme Court of the United States

October Term, 1951.

No. 538.

HARRY GREGORY, ET AL., - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD CO., ET AL., - - - - - - *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, IN OPPOSITION.

COUNTER-QUESTION PRESENTED.

Where petitioners were fully restored to their positions as laborers in accordance with the requirements of the Selective Training and Service Act of 1940, and were thereafter promoted to machinist-helper positions in a different craft in which they had no previous seniority, and where the agreement governing the employment of laborers did not require, and it was not

system" but has undertaken to give the veteran protection "within the framework of the seniority system" (p. 288). They would also have this Court ignore its decision in *Aeronautical Ind. Dist. Lodge* v. *Campbell,* 337 U. S. 521, 526, where it is said that in providing that a veteran shall be restored "without loss of seniority:"

> ". . . Congress was not creating a system of seniority but recognizing its operation as a part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."

Also that:

> ". . . seniority rights derive their scope and significance from union contracts, . . ."

It was stipulated (R. 61) that the retroactive seniority as machinist helpers assigned to petitioners antedating the day on which they first performed service in that capacity was "in contravention of the applicable agreements as they were intended, interpreted and applied by the parties thereto." Yet, petitioners ask this Court to "sweep aside" these agreements and to hold that petitioners are entitled to predated seniority among machinist helpers in the same order in which such helpers held seniority as laborers. They base their request upon an alleged custom and practice*

*While strenuously insisting upon application of a non-existent custom and practice to promote laborers in seniority order, petitioners are equally strenuous in resisting application of the admitted custom and practice of denying such promotion to laborers on furlough or leave of absence.

to promote laborers to helper positions in seniority order contrary to an agreement rule providing that seniority as helper shall date from the first day of service on a regular assignment. That alleged custom and practice having been disproved, necessarily the agreements must prevail and petitioners' cause must fail.

CONCLUSION.

If, as petitioners state, the "blanket of protection" of the Act appears to them to have become a "threadbare cover" (p. 23), it is because the Government officials in charge of the veterans' reemployment rights program have attempted to stretch that blanket to cover cases to which the Act was not intended to apply. The unwillingness of those officials to recede from their early rulings that veterans were entitled to what has been aptly termed "superseniority" accounts in large measure for the alleged "uncertainty, confusion, and conflicts" of which petitioners now complain (p. 25). Their suggestion that these difficulties will disappear if this Court will "reestablish" the principle that veterans should be treated as if they had been "continuously on the job" is only an invitation to this Court to overrule its pronouncements in the *Fishgold* and *Campbell* cases that Congress did not intend to sweep aside the seniority systems and that the conventional uses of those systems must be looked to in order to determine the rights of seniority which the Act guarantees to the veteran.

Such uncertainty, confusion, and conflicts as now exist are slight indeed as compared with the chaos which would result if this Court were to establish—not reestablish—a rule that courts must speculate as to what might have been the status of each veteran had there been no war and if each had remained "continuously on the job."

The case was decided correctly below. The decision is in accordance with numerous others involving similar facts, and there is no such conflict as would justify the requested writ.

For the reasons shown, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 29, 1952.

FILED
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IN THE

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BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS IN OPPOSITION.

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STATUTES

Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 50 U.S.C. App. Sec. 301, et seq., as amended by the Act of July 28, 1942, 56 Stat. 723, the Act of December 8, 1944, 59 Stat. 798, and the Act of June 29, 1946, 60 Stat. 341 ..... 2, 8

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BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS IN OPPOSITION.

Opinions Below

The findings of fact and conclusions of law of the United States District Court for the Western District of Kentucky (R. 122-134) are reported at 92 F. Supp. 770. The order of affirmance of the United States Court of Appeals for the Sixth Circuit (R. 269) is reported at 191 F. (2d) 856.

Jurisdiction

The judgment of the Court of Appeals was entered on October 17, 1951 (R. 269). The petition for a writ of certiorari was filed on January 15, 1952, and notice of the filing thereof was served upon counsel for the intervening defendants-respondents on January 28, 1952. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1).

Counter Statement of Questions Presented

Where a veteran was reemployed in the position which he left to enter the armed forces, with all of the contractual rights and incidents of that position including accumulated seniority, and was subsequently promoted to another position (in a different group or craft or class of employees, with wages, rules and working conditions controlled by different contracts negotiated by a different collective bargaining representative, and with a seniority system under which seniority dates from the time the employee first goes to work in that group), and where such new position was one which the veteran's former position did not entitle him to receive as a matter of right, but which would probably have been offered to him if he had been available to take it instead of being absent in the armed forces, did the Selective Training and Service Act of 1940, as amended, create a statutory right in the veteran to receive such new position, and to be given retroactive seniority in it, dated back to the time when it is assumed the position first would have been offered to him.

Statement

The factual picture presented by petitioners' brief in support of the petition herein is in many respects incomplete and inaccurate, and reflects to a considerable extent the conflict between the parties in the courts below with respect to the conclusions of fact to be drawn from the record. Although conceding that as laborers they had no *right* to be promoted to machinist helper positions in order of their laborer's seniority, they still insist that they *would* have been so promoted had they not been in the armed forces. They further seek to confuse the issues, and to prejudice the court against the respondent parties, by injecting a charge of discrimination against Negroes; when in fact, the

effect of a judgment for petitioners would have been to place them in a position superior to that of Negro machinist helpers whose laborer's seniority antedated that of petitioners.

While these and other questions, as to the facts of the case and the proper interpretation of the applicable collective bargaining agreements involved, would require extended clarification if this Court were to review the judgments below, it does not seem to us that they assume major importance with respect to the question of whether the petition should be granted; and our reference to them is primarily for the purpose of noting our disagreement with the statement presented by petitioners.

In this connection, however, the Court should be apprised of the manner in which the facts of the case were presented to the courts below. Substantially all of the material facts in the case were agreed to in a detailed written stipulation signed by counsel for all parties and filed with the District Court. (R. 53-64.) Notwithstanding this fact, lengthy oral testimony was introduced on behalf of plaintiffs below, the greater portion of which was objected to by counsel for these respondents on the ground that it constituted an attempt to repudiate and refute, rather than supplement, the stipulation thus entered into. (R. 141-143.) The District Court proceeded to hear this testimony, subject to final order of the court on its materiality and admissibility (R. 147), and allowed the objections to such testimony to be continuing (R. 149). At the conclusion of the trial, counsel for all defendants joined in an oral motion to exclude all evidence introduced by the plaintiffs, and the case was submitted. (R. 234.) Thereafter, in its findings of fact and conclusions of law, the District Court held that the oral testimony failed to contradict the facts contained in the stipulation, and that "The facts as con-

tained in the stipulation of the parties filed herein September 1, 1950, are adopted by the Court . . ." (R. 123.)

This view of the facts of the case, as being fully presented by the stipulation, was endorsed by the Court of Appeals below, which noted in its order (R. 269) that ". . . the Findings of Fact by the District Judge are in accordance with the stipulation of the parties herein . . ."

Nevertheless, it should be noted that petitioners are still unwilling to present their case on the basis of the facts as stipulated. Many of the record references in petitioners' statement of facts are to the transcript of the testimony objected to below, and which these respondents assert was improperly introduced and may not be considered by this Court.[1] We respectfully submit that any consideration of the factual aspects of the case must be on the basis of the stipulation subscribed to by all parties.

Argument

The question presented in this case has never been ruled upon by this Court. If it were true, as petitioners assert, that there existed any conflict or confusion among the other federal courts on this question, then we would be the first to agree with petitioners that the question should be settled by this Court. But such is not the situation.

On its facts this case falls squarely within the category of cases which have come to be described, by courts and counsel conversant with the field of veterans' reemploy-

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[1]While it is not clear whether the findings of the District Court were to the effect that respondents' objections to this oral proof were well taken, or that the testimony was simply impotent to contradict the stipulation, it is established that respondents may continue to urge their objection to such testimony since they are doing so in support of, rather than in opposition to, the judgments below. *LeTulle v. Scofield,* 308 U.S. 415, 421-422; *Langnes v. Green,* 282 U.S. 531, 538-539.

ment rights, as the "high probability" cases. The high probability type of claim originated with the case of *Hewitt v. Chicago, South Shore and South Bend Railroad Company,* decided July 23, 1946, by the United States District Court for the Northern District of Indiana, and unofficially reported at 18 L.R.R.M. 2262.[2] In that case the returning veteran who had been a car cleaner claimed the right to a position as carman helper, with retroactive seniority to the time when he claimed he would have received the promotion had he not been in the armed forces. The District Court found that although car cleaners had no contractual right to such promotions in order of their car cleaner seniority, Hewitt's claim should be sustained on the ground that there was a "high probability" of his having been promoted in seniority order had he not been in the armed forces. The following excerpt from the court's oral opinion illustrates the reasoning which was applied:

> "If it is in the speculation area, I should rule against Hewitt; if it is a matter of certainty, I should rule for him. But the problem is not that easy. It seems to me the evidence lends itself to a high probability that he would have been promoted to the job of car helper on that date." (18 L.R.R.M. 2263.)

On April 29, 1947, this holding was reversed by the Court of Appeals for the Seventh Circuit, in the case of *Hewitt v. System Federation No.* 152, *etc.*, 161 F. (2d) 545. Since that time the courts in numerous cases have uniformly rejected the "high probability" claims of returning veterans. Insofar as we are aware, this is the first time that a review by this Court has even been sought on such a case.

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[2]Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Washington, D. C.

Absence of Conflict in Existing Decisions of the Federal Courts.

Petitioners seek review in this case on the grounds that the decision below is in probable conflict with this Court's decision in the case of *Oakley v. Louisville & N. R. Co.*, 338 U.S. 278, and that it is in conflict with the decisions of the Courts of Appeals for the Seventh and District of Columbia Circuits in *Morris v. Chesapeake & O. Ry.*, 171 F. (2d) 579 (C.A.7), cert. den. 336 U.S. 967, and *Conner v. Pennsylvania R.R.*, 177 F. (2d) 854 (C.A.D.C.), cert. den. 339 U.S. 919. All of those cases involved clear-cut contractual rights possessed by the veteran in connection with the position which he left to enter the armed forces.[3] In the *Oakley* case, persons employed as machinists, and who were laid off in force reductions, had the contractual right to preferential hiring at other points on the railroad where machinists were needed. In the *Morris* case, telegraphers had a contractual right to be promoted to new or vacant train dispatcher positions in order of their telegrapher's seniority. And the *Conner* case, as the Court of Appeals stated, was to be distinguished from the *Hewitt* case because the latter involved no "contractual right to transfer from one roster to another on the basis of seniority." (177 F. (2d), 858.)

The cases cited at page 25 of petitioners' supporting

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[3]Even in the field of contractual right, as contrasted with high probability, cases, it is not conceded that these three cases either support the position urged by the Solicitor General, or present any conflict with decisions of other Circuits. The *Oakley* case, of course, was not decided on its merits by this Court. In deciding that case, the Court accepted as true all of the allegations of the complaints of the plaintiffs Oakley and Haynes, and expressly declined to rule on anything but the effect of the Act's prohibition against discharge for one year. (See Note 2 to the Court's opinion, 338 U.S., 280.) In both the *Conner* and *Morris* cases, the value of the decisions as precedents with respect to the interpretation of the Act is largely destroyed by the fact that in each case there was evidence of a practice, by agreement between the company and the union, whereby returning veterans were given retroactive consideration for vacancies occurring during their absence (*Conner* case), or positions were tentatively assigned to employees *in absentia*, pending the establishment of their qualifications (*Morris* case).

brief fail to demonstrate any conflict among the various Circuit Courts of Appeals on the question here presented. The cases of *Mentzel v. Diamond*, 167 F. (2d) 299, and *MacLaughlin v. Union Switch & Signal Co.*, 166 F. (2d) 46, can of course have no weight in view of the later decision in *Dougherty v. General Motors Corp.*, 176 F. (2d) 561, cert. den. 338 U.S. 956, wherein the Court of Appeals for the Third Circuit placed itself in accord with all of the other Courts of Appeals that have passed upon the vacation pay cases. The case of *Spearmon v. Thompson*, 167 F. (2d) 626, not only presents no conflict with the decisions below, but was in fact relied upon by the District Court (R. 134) because of the holding with respect to the plaintiff Delozier. (See *Delozier v. Thompson*, cert. den. 335 U.S. 886.) The remainder of the cases cited by petitioners involved issues completely unrelated to the question presented here.

We submit that there is no conflict among the federal courts which have passed on this question, and that the only conflict which exists is that created by the unwillingness, on the part of the governmental agencies and officials who have charge of this litigation on behalf of returning veterans,[4] to accept a principle which the courts have considered settled since the decision of the Court of Appeals for the Seventh Circuit in the *Hewitt* case, supra. And the only "semi-anarchic" (Petitioners' brief, p. 25)

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[4]The veterans are generally represented before this Court by the Solicitor General of the United States, as in this case, and the Assistant Attorney General, Special Assistants to the Attorney General, and Attorneys for the Department of Justice (*Oakley* case). The policy with respect to such litigation is controlled to a large extent by the Bureau of Veterans' Reemployment Rights of the Department of Labor, which periodically issues interpretative bulletins and legal guides, and sends representatives to consult with the United States District Attorneys charged by the Act with the duty of acting as counsel for returning veterans in the enforcement of their rights under Section 8. In the proceedings below the petitioners herein were represented by Mr. Harry M. Leet, Chief Council of the Veterans Reemployment Rights Division of the Department of Labor (R. 137). Mr. Leet also represented the plaintiffs in the case of *Foster v. General Motors Corp.*, 191 F. (2d) 907, now before this Court (No. 533) on petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit. See also appearances as amici curiae in *Plomb Tool Co. v. Sanger* (C. A. 9), 193 F. (2d) 260, 261.

condition that we are aware of in this field has consisted of the repeated institution of lawsuits on behalf of returning veterans involving claims and theories which have been just as repeatedly rejected by the courts. Thus in the period of almost five years since the decision of the Court of Appeals for the Seventh Circuit in the *Hewitt* case, supra, numerous claims of an almost identical nature have been filed and rejected by the courts, without any attempt being made to obtain review by this Court until the present time. Under these circumstances, a claim that the field is semi-anarchic comes with little grace from counsel for petitioner.

Congressional Rejection of Petitioners' Contentions.

Petitioners argue that Congress intended to provide a "blanket of protection" for veterans which "has worn through in many spots and has become a threadbare cover" as a result of the interpretation of the statute by the courts. The fact is, of course, that there is nothing in the legislative history of the 1940 Act to justify petitioners' interpretation of it, and subsequent legislative developments in fact clearly demonstrate the unwillingness of Congress to weave such an all-encompassing blanket of protection as that which petitioners envision.

Thus, when the Selective Service Act of 1948 (50 U.S.C. App. Sec. 451, et seq.) was under consideration, the following language embodied in H.R. 6401, 80th Congress, 2nd Session, was proposed to be included in order to entitle returning veterans to be restored not just to their "former positions", as in the 1940 Act, but to other and different positions to which they might have been promoted had they not been absent:

> "Sec. 8 (d) Any person who is restored to a position in accordance with the provisions of paragraph

(A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, *shall be entitled to all promotions,* increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to *which he would have been entitled had he been working for the employer during his period of service in the armed forces* * * *" (Emphasis supplied.)

Congress did not include the above quoted language in the Act as finally adopted, but instead adopted the following provision:

"(2) *It is hereby declared to be the sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *should* be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his restoration to such employment." (Emphasis supplied; Selective Service Act of 1948, Section 9 (c) 2).

That the language last quoted above was intended to be *precatory* and not mandatory is clearly indicated by a reading of the following provisions of Section 9 (b) of the 1948 Act imposing mandatory obligations to reemploy veterans upon (A) the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, and (B) upon private employers, but providing only for a "precatory" or suggested treatment of veterans who left the employment of (C) any state or political subdivision thereof:

"(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, *such person shall* * * * be restored to such position * * *

"(B) if such position was in the employ of a private employer, *such person shall* * * * be restored * * * to such position

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress that such person should* * * * be restored to such position * * *"[9] (Emphasis supplied.)

We submit that the rejection by Congress of a proposal for the express guaranty of promotions for veterans, and the substitution therefor of language which on its face does not require such treatment but merely suggests its desirability as a matter of policy, clearly demonstrates that Congress did not wish to create any such rights as petitioners assert in a legal, or mandatory, sense, but was content with the statement of a policy the application of which it desired but did not require.

In view of this legislative background, it becomes apparent that litigation such as this simply constitutes an attempt to obtain from the courts, under the guise of statutory interpretation, something which Congress has expressly refused to grant.

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[9]The quoted "sense of the Congress" language is identical with that appearing in Section 8 (b) (C) of the 1940 Act.

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Conclusion

For the reasons stated above, we believe that the decision below is correct and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated at Toledo, Ohio
February 26, 1952

LEED THRU

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties of record herein on the 26th day of February, 1952, by mailing copies thereof to the Solicitor General of the United States, counsel for petitioners Harry Gregory, Charles Van Vactor and Casper Waters; and Messrs. C. S. Landrum, J. P. Hamilton and H. T. Lively, counsel for respondent Louisville & Nashville Railroad Co.

RICHARD R. LYMAN

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